ORAL ARGUMENT NOT YET SCHEDULED
Nos. 18-1151, 18-1180

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MURRAY AMERICAN ENERGY, INC., et al.,

Petitioners/Cross-Respondents,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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BRIEF OF INTERVENOR UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. Parties and Amici

All parties, intervenors, and amici appearing before the National Labor Relations Board and in this Court are listed in the Brief of Respondent.

II. Rulings Under Review

Reference to the ruling under review appears in the Brief of Respondent.

III. Related Cases

This case has not been previously before this Court. The Intervenor is not aware of any related cases pending or about to be presented before this or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, the Intervenor United Mine Workers of America International Union (the "UMWA") makes the following disclosures:

Non-governmental party to this action: The UMWA

Parent corporation(s): None

Publically-held corporation that owns 10% or more of party's stock: None

Party's general nature and purpose: The UMWA is a labor organization within the meaning of Section 310 of the Labor-Management Relations Act (29 U.S.C. § 185) and is an unincorporated association whose members have no ownership interests in the association. The UMWA represents unionized employees of the Petitioners in this action, working at each of the coal mines at which the events relevant to this action occurred. Each of the individuals whose complaints under Section 8(a) of the National Labor Relations Act (29 U.S.C. § 158(a)) initiated this action were, at all times relevant to this case, either UMWA members or UMWA officials.

Party's members who have issued shares or debt securities to the public: None

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GLOSSARY OF ABBREVIATIONS

"A."	Citations to the Joint Appendix
"Act"	The National Labor Relations Act, 29 U.S.C. §§ 151 *et seq*.
"Board" or "NLRB"	The National Labor Relations Board
"CBA"	The collective bargaining agreement in force between the Petitioners and the Intervenor: the National Bituminous Coal Wage Agreement of 2016
"FMSHRC" or the "Commission"	The Federal Mine Safety and Health Review Commission
"Mine Act"	The Mine Safety and Health Act, 30 U.S.C. §§ 801 *et seq*.
"MSHA"	The federal Mine Safety and Health Administration
"Murray" or "Company"	Petitioners Murray American Energy, Inc.; Harrison County Coal Co.; Marion County Coal Co.; Monongalia County Coal Co.; and Marshall County Coal Co.
"Murray Br."	Brief of Murray, filed September 4, 2018
"NLRB Br."	Brief of the NLRB, filed November 5, 2018
"UMWA" or "Union"	Intervenor United Mine Workers of America International Union

STATEMENT OF ISSUES

The issues presented in this case are stated in the Brief for the NLRB.

STATUTES

All of the principally applicable statues are contained in Murray's Brief.

STATEMENT OF THE CASE

I. Factual Background

The facts relevant to this case are set forth in the Brief for the NLRB.

II. Procedural History

The procedural history of this case is set forth in the Brief for the NLRB.

III. Rulings Under Review

The ruling under review is a Decision and Order of the NLRB issued on May 7, 2018 and reported at 366 NLRB No. 80.

SUMMARY OF ARGUMENT

The Board order at issue in this case should be enforced in full, for the reasons stated in the Brief for the NLRB. To the extent that Murray's objections to the order are based in disputes regarding the credibility of the UMWA witnesses who testified at hearing, consideration of the Company's own record of violating the Act and the Mine Act – as found by the NLRB and the FMSHRC – provides reasons in addition to those stated by the NLRB to affirm the Board's credibility findings. UMWA witnesses Joshua Peek, Jamie Hayes, and Joshua Preston

testified to management threats and other unlawful statements by Murray that are markedly similar to wrongdoing attributed to the Company in past NLRB and FMSHRC decisions, as well as to violations found by the Board in this case that Murray has declined to specifically contest. The fact that the testimony of UMWA witnesses is consistent with Murray's demonstrated patterns of statutory violations lends substantial support to the testimony and indicates that the NLRB was correct in finding the testimony to be credible.

Additionally, findings in a past NLRB case regarding the coarse and often acrimonious work environment of the Marion County Mine demonstrate that the loud and irritated manner in which Hayes made safety complaints to Murray was well within the range of normal employee/employer communication at the mine. The holdings in this case also show that employees retain the Act's protection in their communications with management even when those communications direct profanity at the managers themselves. Under these circumstances, it is clear that Hayes retained the Act's protection when making his safety complaints.

Finally, the record provides evidence, in addition to that cited by the NLRB, to support the Board's conclusion that Murray either did or should have readily understood the relevance of the information regarding contract workers that the UMWA requested from Monongalia County Coal. Such evidence bolsters the

Board's conclusion that the UMWA is entitled to the information sought in these requests and that Murray violated the Act in failing to provide it.

ARGUMENT

I. THE UMWA ENDORSES THE ARGUMENTS PRESENTED BY THE NLRB

The UMWA files this brief in support of the NLRB and endorses each of the Board's arguments. The UMWA, therefore, concurs with the NLRB that the Board is entitled to summary enforcement of all of its findings that Murray has not specifically contested, and that substantial evidence supports the Board's findings that Murray committed multiple enumerated violations of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), violated Sections 8(a)(1), 8(a)(3), and 8(a)(4) (§§ 158(a)(1), (3) & (4)) in suspending miner Mark Moore, and violated Sections 8(a)(1) and 8(a)(5) of the Act (§§ 158(a)(1) & (5)) through the Company's inadequate responses to certain UMWA information requests and by unilaterally changing a term of employment applicable to Union members without bargaining first with the UMWA – all for the reasons articulated in the Board's brief. *See* NLRB Br. at 21 – 57.

II. UMWA WITNESS TESTIMONY SUPPORTING THE BOARD'S FINDINGS IS CREDIBLE BECAUSE THE VIOLATIONS DESCRIBED ARE CONSISTENT WITH MURRAY'S PRIOR PATTERNS OF WRONGDOING

As the NLRB noted, "[m]ost of the Company's challenges" to the Board's determinations in this case "depend on the Court rejecting the Board's credibility findings…" *Id*. at 19. Specifically, Murray claims that the following testimony from UMWA witnesses lacked credibility: miner Joshua Peek's testimony that superintendent Scott Martin threatened him because he filed a grievance; miner Jamie Hayes' testimony regarding shift foreman Donald Jones' directive to miners to refrain from filing MSHA complaints; testimony from UMWA official Michael Payton and miner Rick Rinehart that safety supervisor Jeremy Divine engaged in surveillance of protected Union activity; and miner Joshua Preston's testimony that assistant general foreman Ben Phillips threatened him because he requested Union representation in a meeting with management. *See* Murray Br. at 26-29, 35, 39-41.

As the NLRB explains, Murray faces a high bar in seeking to overturn the Board's credibility determinations, and the Company has not come close to meeting that standard. *See* NLRB Br. at 23-24. It is important to note, further, that the events of this case did not occur in a vacuum. Instead, Murray's violations – as found by the NLRB – are part of an ongoing pattern of statutory violations committed by the Company and confirmed both in prior NLRB cases and in decisions reached by the FMSHRC. The distinct similarities between the violations

found by the NLRB here and those noted in prior cases support the credibility of much of the aforementioned witness testimony, underscore the veracity of the witnesses' accounts, and provide additional reasons – beyond those stated by the NLRB – to affirm the Board's determinations in this matter.

A. Peek testified credibly that Martin threatened him for filing grievances.

Peek explained that Martin directed him to withdraw the grievance he filed on account of management employee George McCauley's performance of work reserved for bargaining unit members under the CBA. Peek then related Martin's statement that if Peek declined to withdraw the grievance, Martin would take that fact "into consideration" when deciding whether to help Peek with workplace matters, should he need such assistance in the future. A. 123. As the NLRB found, "Peek took this as a reference to favorable treatment that Martin had provided to Peek in the past," including schedule adjustments that enabled Peek to be home at night to attend to family matters. *Id*. Martin denied making this statement. The NLRB, however, credited Peek, finding him to be "honest and straightforward" while Martin presented "fast-talking and overconfident" testimony that the Board "simply [did] not believe." *Id*.

Murray does not dispute that the statement to which Peek testified would be unlawful; instead, the Company asserts that Martin made no such statement and that the Court should credit his testimony over Peek's. *See* Murray Br. at 26-27.

Martin, however, does not have a history of credible testimony. Recently, in a case concerning the discriminatory discharge of a miner in violation of the Mine Act, Martin testified that he had no knowledge of the protected activity that the FMSHRC found to have motivated the miner's discharge. The FMSHRC administrative law judge found this claim to be "not credible, and at worst, due to willful ignorance" and ruled in the miner's favor. *Sec'y of Labor* ex rel. *Scoles v. Harrison County Coal Co.*, Docket No. WEVA 2016-274-D, 2018 WL 4859049 at *22 (FMSHRC Sept. 20, 2018).

Notably, beyond Martin's testimony, the FMSHRC judge described a pervasive lack of credibility on the part of management at the Harrison County Mine, where Peek works. The judge found that McCauley, who prior to the FMSHRC case physically attacked the complaining miner and later singled him out for unusual work orders, was "largely not credible" inasmuch as his testimony was "self-serving and wholly at odds with the other witnesses," and "contrary to reason." *Id*. at *5 n. 12, *7 n. 15. Additionally, the judge found human resources representative Chris Fazio "to be a less than credible witness" who, like Martin, claimed unlikely ignorance of relevant events. *Id*. at *26; *see also id*. at *22-23. The Commission rejected Murray's subsequent appeal, making the judge's decision the final order of the FMSHRC. *See* 30 U.S.C. § 823(d)(1) (stating that a judge's decision becomes final if the FMSHRC has not directed review within

forty days of the decision's issuance). While Murray retains a right to further appeals but has so far declined to exercise it.

It is apparent, therefore, that the Board's finding that Martin lacked credibility in the case at hand is consistent both with another tribunal's assessment of his prior testimony and with the generally low level of credibility shown by management employees at the Harrison County Mine in the past. These facts bolster the Board's finding that Martin did not testify credibly here and, in turn, support the Board's determination that Martin unlawfully threatened Peek on account of his grievance filing.

Also relevant to this assessment is the fact that the NLRB found, and Murray does not dispute, that management at the Marshall County Mine violated the Act by threatening to close the mine if miners continued to file grievances. *See* A. 133. The NLRB states that the petitioners in this matter comprise a single employer, and in a past court filing, the petitioners have described themselves as a collective entity. *See* NLRB Br. at 4 and Complaint at 1, ¶¶ 1-2, *Consolidation Coal Co.,* et al. *v. UMWA Int'l Union,* et al., Docket No. 1:15-CV-167, 191 F.Supp.3d 572 (N.D. W.Va. 2016) (filed June 10, 2016). It is evident, therefore, that Murray as a whole has a history of threatening retaliation against grievance filers. *See* NLRB Br. at 4. This history gives further weight to the Board's finding that Peek testified

credibly regarding Martin's unlawful threats against him and provides additional support for the Board's arguments before this Court.

B. Hayes testified credibly that Jones directed miners not to file MSHA complaints.

Hayes described how Jones, in a meeting ostensibly focused on mine safety, told miners that they do not need to report safety complaints to MSHA and that they should bring them to management, instead. Hayes explained further that Jones threatened that management would close the mine, putting the miners out of work, if miners persisted in making MSHA complaints. He stated that Jones and assistant superintendent Chris England repeated these statements in a subsequent meeting the next day. *See* A. 126-28.

Murray's witnesses did not dispute that Jones threatened to close the mine on account of miners' legally-protected complaints or that he and England reiterated the threat the next day, while also repeating the directive that miners should not file complaints with MSHA. Jones did not testify; instead, Murray attempted to refute Hayes' account through other management witnesses, who disputed that Jones directed miners to report their safety concerns to management rather than to MSHA. Despite this testimony, the NLRB credited Hayes, both because of his demeanor and because his testimony was plausible inasmuch as it is reasonable to conclude that management employees who threatened to close the mine on account of miners' MSHA complaints also would instruct miners to

refrain from making such complaints at all. In contrast, the NLRB found implausible Murray's assertion that the Company directed miners to report to management those safety concerns that otherwise would be the subject of MSHA complaints without a concomitant directive that miners should not report the hazards to MSHA. *See* A. 127-28.

Murray does not dispute that the statements Hayes described would violate the Act. Instead, Murray claims that Jones and England did not make the statements at all and that the Company would not have committed such a blatant violation. *See* Murray Br. at 28-29. As the NLRB notes, however, this case makes it clear that Murray will, in fact, commit clear violations of the Act. *See* NLRB Br. at 26-27; *see also id*. at 21-22 (enumerating violations uncontested by Murray, including threatening and disciplining miners for requesting Union representation, threatening to close a mine on account of miners' grievances, disciplining a miner for planning to file a grievance, and failing to respond adequately to UMWA information requests).

Furthermore, the management directive that Jones described is consistent with prior statements made by Robert Murray – the Company's CEO – to miners at all of the mines involved in this case, including the Marion County Mine, where Hayes works. As the FMSHRC found, between April and July of 2014, Robert Murray held mandatory, all-employee meetings at each of these mines, where he

gave substantially identical speeches and made substantially identical PowerPoint presentations. *See Sec'y of Labor* ex rel. *McGary*, et al. *v. Marshall County Coal Co.*, et al., 38 FMSHRC 2006, 2008, 2015 (2016) (op. of Comm'rs Young, Nakamura & Althen).

Mr. Murray's PowerPoint slides included the following statements: "You Must Report Unsafe Situations and Compliance Issues to Management so that they Can Be Addressed By Management" and miners are "Required to Make the Same Report to Management" that they make to MSHA via a safety complaint. *Id*. at 2016 (op. of Comm'rs Young, Nakamura & Althen) (emphasis in original). Robert Murray also presented slides claiming that MSHA found no merit to many miners' complaints, and he offered such findings as proof of his allegation that miners were filing bad-faith complaints that "Hurt[ ] [miners'] Company and Job Survival." *See id*. at 2016, 2018 (emphasis in original).[1] There is no dispute regarding the content of Robert Murray's presentation, a written copy of which he provided to the UMWA in advance. *See id*. at 2008.[2]

[1] In an audio recording of one of Robert Murray's presentations, he is heard to threaten to close the Marshall County Mine if miners continued to make MSHA complaints. The FMSHRC did not rely on this recording in reaching its decision, holding that Robert Murray's PowerPoint slides provided ample reason to find a violation of the Mine Act. *See id*. at 2008, 2019.

[2] While the FMSHRC issued a split decision in this case, the Commissioners were united in their assessment of the content of Robert Murray's presentations and in finding that the presentations violated the Mine Act. The Commissioners differed

The Mine Act guarantees to miners the right to make MSHA complaints confidentially, without their employer learning of their identities as complaining parties. *See* 30 U.S.C. § 813(g)(1) (providing that while a mine operator is entitled to receive a written copy of any safety complaint an employee files with MSHA, the copy must not include the complainant's name); *see also McGary*, 38 FMSHRC at 2013-15 (op. of Comm'rs Young, Nakamura & Althen) (explaining miners' right to file anonymous hazard complaints). The FMSHRC found that Robert Murray's presentations interfered with miners' complaint-filing rights, in violation of the Mine Act, because they directed miners to forego their legally-protected anonymity by reporting the substance of their MSHA complaints to management. *See id*. at 2016 (op. of Comm'rs Young, Nakamura & Althen). Although Robert Murray also presented a slide disclaiming any intent to commit such a violation, the FMSHRC found this to be an inadequate defense, given that the slide was "bookended" by information that undermined miners' anonymity rights and informed them that continued MSHA complaints "could have severe consequences for [their] continued employment." *Id*. This case is presently under appeal in this Court. *See* Petition for Review, *Marshall County Coal Co.*, et al. *v. FMSHRC,* et al., Docket No. 18-1098 (D.C. Cir.) (filed April 12, 2018).

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only in their views of the appropriate legal standard to apply and in the amount of the civil penalty to impose on Murray. *See id*. at 2012 n. 11 (op. of Comm'rs Young, Nakamura & Althen), 2028 (op. of Comm'rs Jordan & Cohen).

The management statements that Hayes described are perfectly consistent with Robert Murray's earlier presentations. In both cases, management demanded that miners report their safety concerns to the Company and indicated that miners threatened their own future employment by continuing to make complaints to MSHA. The clear import of such statements, as the FMSHRC found, is that miners should refrain from exercising their Mine Act hazard-reporting rights and should make their safety complaints exclusively to management, instead.

This assessment is correct even if Jones and England did not tell Hayes directly that he must not file MSHA complaints; under the circumstances, it is necessary to "take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the later that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). Here, it is clear that the "intended implications" of management's statements to Hayes was that he should refrain from making MSHA complaints, lest he compromise his future employment and that of his coworkers. Due to the consistency between Hayes' testimony and Murray's earlier statements regarding MSHA complaints, it is equally clear that the NLRB was correct in crediting Hayes.

Also notable is the fact that after Murray's unlawful PowerPoint presentations, the Company continued its effort to discourage miners from making MSHA complaints by filing a federal lawsuit against the UMWA, alleging that such complaints were part of an "anti-management campaign" waged in violation of the CBA. Complaint at ¶¶ 5-6, *Consolidation Coal*, 191 F.Supp.3d 572. On the Union's motion, the court dismissed the case with prejudice, finding that the CBA mandated arbitration of Murray's claims. *See Consolidation Coal*, 191 F.Supp.3d at 582. Murray declined to submit the matter to arbitration. Such further efforts to block miners' exercise of their right to file MSHA complaints lends further credence to Hayes' testimony here and offers another reason, in addition to those stated by the NLRB, to credit him.

C. Preston testified credibly that Murray threatened him in retaliation for his request for Union representation.

Preston testified that shift supervisor Teddy Perkins called him in to a meeting with management at the Marshall County Mine to discuss the reasons why certain mining equipment was not in its specified place at the beginning of Preston's shift. *See* A. 135. Preston stated further that he requested Union representation, and although Phillips initially disclaimed any intention to discipline Preston in the meeting, Phillips told him, "if you want wrote up" – that is, to be disciplined – "I can find something to write you up with, and you can come back tomorrow at 4:00 with your union representation." *Id*.

In contrast, Phillips claimed that Preston arrived at his office of Preston's own accord, to ask for some unidentified favor from management. Further, Phillips denied that Preston ever asked for representation and denied threatening to discipline him, or even mentioning the subject of discipline in the meeting. Perkins did not testify, however, and Murray did not rebut Preston's testimony that he attended the meeting with Phillips because management ordered him to do so. Also undisputed was the fact that Preston never actually requested a favor from Phillips. Additionally, mine foreman John Kirk – who also attended the meeting – testified that Phillips understood that Preston was concerned about being disciplined. *See* A. 135-36.

Finding that both Kirk and Preston had refuted "Phillips' essential claim, that the union representation and discipline were unmentioned in the conversation"; that Murray's witnesses offered no support for the assertion that Preston had gone to Phillips' office to ask for a favor; and that Preston's demeanor was credible at hearing, the NLRB credited Preston. A. 136. This holding supported the Board's further finding that Murray violated the Act by threatening to discipline Preston on account of his request for representation. *See id*. In response, Murray argues primarily that the NLRB was wrong to credit Preston. The Company maintains its position that Preston went to Phillips to request a

favor, that he never asked for Union representation, and that Phillips did not threaten to discipline him. Murray Br. at 40-41.

Notably, however, Murray does not dispute that the Company violated the Act when management at the Marion County Mine threatened miner Mike DeVault for requesting Union representation and by impliedly threatening other employees if they did the same. *See* A. 124-26. In that instance, DeVault offered undisputed testimony that production foreman Tim Legg called him into a meeting, claiming that he did not plan to discipline DeVault. Yet, once DeVault requested representation, Legg informed him that he would, in fact, be disciplined. *See* A. 124. Mine foreman Clell Scarberry eventually suspended DeVault with intent to discharge, informing him that miners "who needed reps to speak with [management]" were not welcome at the Marion County Mine. A. 125. Legg added that management at Scarberry's former mine maintained a practice of discharging miners who asked for representation. *See id*. Management later rescinded the discipline, with human resources supervisor Pamela Layton telling DeVault that he was "a hundred percent in the right" and that Murray would "counsel" Legg "for all actions" related to the discipline. *Id*.

Although Murray claimed that the Company had suspended DeVault for refusing to enter the meeting once Legg informed him that he would not be disciplined, the NLRB found that DeVault's request for Union representation was

the true motivating factor and that Murray had therefore violated the Act. *See* A. 125-26. Inasmuch as Murray is a single employer for the reasons noted in Section II(A), *supra*, the Board's findings regarding DeVault's discipline – and Murray's apparent acceptance of those findings – indicate the existence of a Company-wide practice of disciplining and threatening to discipline miners who request Union representation. This fact lends credence to Preston's testimony regarding the actions of management at the Marshall County Mine and provides an additional reason, beyond those stated by the NLRB, to affirm the Board's findings regarding Murray's actions against Preston.

III. HAYES' BEHAVIOR WAS INSUFFICIENTLY EXTREME TO LOSE THE ACT'S PROTECTION, IN THE CONTEXT OF THE WORK ENVIRONMENT OF THE MARION COUNTY MINE

During the so-called safety meeting in which Jones and England directed miners not to file MSHA complaints and threatened their job security if they continued to do so, Hayes became irritated and complained loudly to management that on multiple occasions, Murray had failed to remedy safety hazards that he had brought to the Company's attention. Eventually, Hayes left the meeting in frustration and returned to his work. Portal supervisor Chris Simpson, who was not in the meeting but who claimed to have observed and overheard the proceedings, testified that Hayes had moved toward Jones and pointed his finger in Jones' face. The NLRB did not credit his account but did find that Hayes spoke in an angry and

loud manner, leading assistant shift foreman Dave Chapman to admonish Hayes to calm down. *See* A. 127-28.

Murray does not attempt to defend the testimony of the Company's own witness that Hayes moved physically toward Jones and pointed at him aggressively. Instead, Murray states only that Hayes "became agitated, stood up, and began loudly complaining about safety issues," that Chapman made some effort to intervene, and that Hayes left the meeting in anger. Murray Br. at 10; *see also id*. at 11. This presentation of the facts is entirely consistent with the Board's findings regarding Hayes' actions and entirely inconsistent with Simpson's testimony. It appears, therefore, that Murray accepts the Board's finding that Hayes did not physically threaten Jones.

Hayes offered further unrebutted testimony that the day after the so-called safety meeting, Murray threatened that the Company would discipline him if he engaged in similar protests of Murray's safety record in the future. *See* A. 128. The NLRB found this "explicit threat of discipline" to violate the Act. A. 129. Murray does not dispute that the Company threatened to discipline Hayes or that in most cases, the comments that he made in the meeting would be protected under the Act. Instead, Murray's principal objection to the Board's finding is that due to Hayes' alleged belligerence, his comments lost the Act's protection under *Atlantic Steel Co.* (245 NLRB 814 (1979)). *See* Murray Br. at 32.

Analysis of each of the four *Atlantic Steel* factors weighs in favor of protecting Hayes' statements, for the reasons that the NLRB articulates. *See* NLRB Br. at 31-34. Further, the work environment of the Marion County Mine provides additional reasons to find that under the third *Atlantic Steel* factor – "the nature of the employee's outburst" – Hayes remained protected by the Act, as the Board held. *Atlantic Steel*, 245 NLRB at 816.

It is instructive that in a past case, an NLRB administrative law judge found that "profane language…was commonplace at the…mine" among both hourly and management personnel, such that it had become "basic language underground." *Murray Am. Energy, Inc.*, et al., Case No. 06-CA-148388, 2016 WL 1359359 (NLRB April 5, 2016) (Randazzo, ALJ). Murray tolerated hourly workers using profanity among themselves and tolerated management directing profanity against the hourly workforce. In some cases, hourly workers even used profanity against management without discipline. *See id*. The judge found further that Robert Murray himself – the Company's "highest ranking management official" – directed profanity at employees during his visits to the Marion County Mine. *Id*.

Under these circumstances, the judge held that Murray's claim to have discharged two miners for insubordination, including profanity, was pretextual. *See id*. The miners had written profane statements – "Kiss My Ass Bob" and "Eat Shit Bob," respectively – on the backs of bonus checks that they returned to Murray. *Id*.

Both of the miners objected to the production-based bonus program pursuant to which the Company had issued the checks based on their belief that the program would endanger miners by encouraging them to prioritize faster coal production over time-consuming safety measures. "Bob," in this context, referred to Robert Murray. *See id*.

The judge found that the miners were engaged in protected activity when they protested the bonus program, and their profanity did not cause them to lose the Act's protection under *Atlantic Steel*. *See id*. Although the judge agreed that the miners' comments were "confrontational," he determined that they did not threaten violence against management and were not "planned out" or "deliberate," and so did not rise to the level necessary to revoke the Act's protection. *Id*. This analysis, coupled with Murray's tolerance of profanity at the Marion County Mine "on a daily basis" as "an accepted part of the miners' work environment" led the judge to find that the miners' statements were protected and their discharges violated the Act. *Id*. Murray filed no exceptions, and the judge's findings subsequently became the Board's final order. *See Murray Am. Energy, Inc.* et al., Case Nos. 06-CA-148388 & 06-CA-149117, 2016 WL 2894515 (NLRB May 17, 2016).

This case is notable for two reasons: First, it establishes that rough and abusive language is common and widely tolerated at the Marion County Mine, regardless of whether it flows from management to employees or from employees

to management. In this context, Hayes' loud and irritated safety complaints can hardly be viewed as unusual or intolerable behavior, especially considering the lack of any evidence that Hayes directed profanity at Jones. Second, this case demonstrates the considerable leeway granted to employees under the Act when they engage in protected activity by communicating with management regarding safety concerns. Given that employees are permitted to tell their employer's CEO to "Kiss My Ass" and "Eat Shit" as long as the employees make those statements in the context of protected safety complaints, it is clear that Hayes did not lose the Act's protection when he made loud and irritated complaints to Murray regarding what he saw as the Company's record of failure in addressing hazards at the Marion County Mine. The NLRB, therefore, was correct in finding that Hayes' statements were protected. The Board's prior holdings regarding the work environment of the Marion County Mine offer further support to the Board's articulation in this case of the reasons why the Act protected Hayes' conduct.

IV. THE RELEVANCE OF THE UNION'S REQUESTS FOR INFORMATION REGARDING CONTRACTORS WAS OR SHOULD HAVE BEEN OBVIOUS.

On March 28, 2016, UMWA representative Mike Phillippi requested from Murray invoices, bills, bid forms, estimates, and other documents regarding work performed or planned to be performed by contractors – that is, by non-Union workers – at the Monongalia County Mine since July 2015. *See* A. 143. Phillippi

explained that the UMWA needed this information "to monitor compliance" with the CBA "and to determine whether or not to file or pursue any grievances" alleging that Murray was improperly employing contractors to perform work reserved for Union members. *Id*. When he received no reply, Phillippi reiterated his request on March 31, 2016. In subsequent communications with Murray, he repeated that the UMWA needed the information to assess the Company's compliance with the CBA, particularly in light of evidence that Murray was employing contractors at the Monongalia County Mine and in the aftermath of an arbitrator's finding that the Company had wrongfully directed bargaining unit work to contractors. *See id*.

Murray's only responses were to allege that Phillippi's request was burdensome, to claim that the Company did not maintain certain of the types of records that the UMWA requested, and to demand that any Union request for information about contractors at the Monongalia County Mine specify a "date, grievant, contractor, [or] project" to which the request pertained. A. 143. At hearing, human resources representative Karen Mohan – who had corresponded with Phillippi regarding his information request – admitted that Murray might, in fact, maintain all of the requested information, but that she had declined to investigate to determine whether that was the case. *See* A. 144. At no time did Murray argue that the information requested by the UMWA was irrelevant to the

parties' bargaining relationship. To date, Murray has not responded to the Union's request. *See* A. 143.

The NLRB found that the Union's request met the "discovery-type standard" for assessing the relevance of requests for information regarding workers who are not members of the bargaining unit. A. 144, quoting *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 437 (1967). Further, the NLRB determined that "the record demonstrates that the contractors' work at the mine and their alleged performance of bargaining unit work, was an ongoing and repeated source of dispute between the parties" such that it was "the source of many grievances, and multiple arbitrations." *Id*. The NLRB concluded, "In these circumstances, the relevance of the request should have been apparent to the Respondent – and indeed, Mohan…did not question its relevance." *Id*. In any event, as the NLRB noted, Phillippi explained the request's relevance in his communications with Murray. *See id*. As a result, the NLRB found that Murray's non-response to the Union's request violated the Act. *See* A. 146.

Before this Court, Murray now argues that the UMWA requested irrelevant information that the Company was not obligated to provide. Murray Br. at 47-49. Regarding such requests for information about non-bargaining unit employees, it must be shown "either (1) that the union demonstrated relevance of the nonunit information, or (2) that the relevance of the information should have been apparent to the [employer] under the circumstances." *Disneyland Park*, 350 NLRB 1256,

1258 (2007). Here, not only did Phillippi state the relevance of the information that the UMWA requested, but such relevance was or should have been obvious to Murray, for the reasons stated by the Board. NLRB Br. at 52-54.

The record provides additional reasons why the relevance of the Union's broad-based request for information regarding contractors was or should have been apparent to Murray. First, Murray was aware of such disputes as early as July 1, 2011, as evidenced by a letter from the Bituminous Coal Operators' Association – of which the Company is a principal member – to UMWA President Cecil Roberts, recognizing the Union's "concerns" regarding subcontracting and offering to "meet and discuss" the issue with the UMWA. A. 558. Second, Murray was aware that as of October 14, 2015, any such discussions had not resolved the issue, as shown by a grievance filed by four miners who accused management at the Marion County Mine of using contractors to perform bargaining unit work.[3] *See* A. 673. Unsurprisingly, then, Murray does not dispute the Board's findings that "ongoing

[3] Miners at the Monongalia County Mine continue to grieve Murray's improper assignment of unit work to contractors, and they continue to win at arbitration. Murray, meanwhile, continues to perpetuate the contracting dispute by challenging the arbitration awards in federal court. *See* Complaint, *Monongalia County Coal Co. v. UMWA Int'l Union,* et al., Docket No. 1:18-cv-00046 (N.D. W.Va.) (filed Feb. 26, 2018); Complaint, *Monongalia County Coal Co. v. UMWA Int'l Union,* et al., Docket No. 1:18-cv-00132 (N.D. W.Va.) (filed June 12, 2018); Complaint, *Monongalia County Coal Co. v. UMWA Int'l Union,* et al., Docket No. 1:18-cv-00171 (N.D. W.Va.) (filed Aug. 31, 2018); *and* Complaint, *Monongalia County Coal Co. v. UMWA Int'l Union,* et al., Docket No. 1:18-cv-00176 (N.D. W.Va.) (filed Sept. 11, 2018).

and repeated" disputes existed between the Company and the UMWA regarding contracting at the Monongalia County Mine. These facts provide additional support, beyond that supplied by the NLRB, to affirm the Board's holding that the information requested by the Union is relevant to the parties' bargaining relationship and that Murray violated the Act in failing to provide it.

CONCLUSION

The NLRB correctly lists the reasons why Murray's threats against miners, directives that miners should not exercise their protected right to file MSHA complaints, surveillance of miners' protected Union activity, discriminatory discipline of miners, and failure to respond adequately – or at all – to UMWA information requests violated the Act. The NLRB also provides a number of reasons to affirm the Board's findings that UMWA witnesses testified credibly to these violations. Further, in a number of instances, the similarities between the unlawful actions to which UMWA witnesses testified and Murray's past record of statutory violations provide additional reasons to credit the Union witnesses' accounts.

Likewise, the Board's past findings regarding the work environment of the Marion County Mine provide additional support, beyond that stated by the NLRB, to affirm the Board's finding that Hayes retained the Act's protection in making safety complaints to Murray. Finally, the record evidence cited by the NLRB and

that cited in the Argument above provides ample support for the Board's conclusion that Murray's failure to respond to UMWA information requests violated the Act. For these reasons and those stated by the NLRB, this Court should deny Murray's review petition, grant the Board's cross-application for enforcement, and enforce the Board's order in full.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief complies with Federal Rule of Appellate Procedure 27(d)(1)(E) because it is proportionately spaced and has been prepared using fourteen-point Times New Roman font.

I hereby certify that the foregoing Brief contains 5,927 words, exclusive of those portions exempted by Federal Rule of Appellate Procedure 32(f) and by Circuit Rule 32(e)(1). I have relied on Microsoft Word's calculation feature.

Dated: November 13, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2018, a true and correct copy of the foregoing Brief of Intervenor was served on the following via the Court's EM/ECF electronic filing system, which will send notice to the counsel of record for each of the following parties:

The Marshall County Coal Co.

The Harrison County Coal Co.

The Monongalia County Coal Co.

The Marion County Coal Co.

Murray American Energy, Inc.

National Labor Relations Board

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